BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia appears at page 53 of the Record. It has not yet been officially reported.

Question Presented

The question presented is stated in the petition, supra.

Specification of Errors

The United States Court of Appeals for the District of Columbia erred in assuming the power to make an original finding of fact in a jury case where none was made in the trial court by either the judge or jury and where such finding by either the trial judge or the jury was essential to an affirmance of the judgment awarded to respondent.

ARGUMENT

The finding of fact in the opinion below was beyond the scope of appellate review in jury cases and constitutes a violation of the Seventh Amendment.

In submitting the case to the jury, the trial judge granted respondent's Prayer No. 1 (R. 44) which instructed the jury that if they found that respondent was the procuring cause of orders for Tectyl received by petitioner their verdict should be for the respondent. The trial court ignored the question as to petitioner's right to terminate the contract although petitioner urged that it had such a right. The jury arrived at its verdict without any instruction as to the effect to be given to petitioner's termination of the contract of employment.

It is well settled law that a contract for services which is silent as to its duration is terminable at will.

> *Crowe* v. *Trickey*, 204 U. S. 228, 51 L. ed. 454;
> *Willcox & G. Sewing Machine Co.* v. *Ewing*, 141 U. S. 627, 35 L. ed. 882.

The only exception to the foregoing rule is where the employee is the procuring cause of the sale and the employer terminates in bad faith to avoid the payment of his compensation.

> *Crowe* v. *Trickey, supra.*

Petitioner's brief in the court below urged that a reversal was inevitable because there had not been any finding by the trial judge on the question of bad faith nor was that question submitted to the jury. There was substantial direct evidence that petitioner exercised its right to terminate because of respondent's unsatisfactory performance. There was also some evidence from which an inference of bad faith might be inferred. It is not deemed here appropriate to argue the overwhelming evidence showing good faith. For purposes of this Petition, it is sufficient to indicate that, construing the evidence most favorably for respondent, there was at best a clear issue as to whether petitioner possessed good or bad faith in terminating the employment.

Notwithstanding that state of the record and the clear necessity for a finding in the District Court on the issue of bad faith, the court below substituted itself for the jury and made an original finding of bad faith by saying: (R. 54).

> "It is true that a brokerage contract of indefinite duration is for a reasonable time only and may be terminated at will on reasonable notice. But the termina-

tion must be in good faith. The principal may not terminate the contract for the purpose of depriving the broker of commissions to become due by reason of work already done. We think it plain that defendant terminated plaintiff's contract for this purpose. Though it was made with knowledge that there would be few immediate sales because of the necessity of lengthy tests, it was terminated before those tests could be completed. Though defendant now suggests that it was terminated because plaintiff failed to bring in business and because of a contemplated arrangement with another company, plaintiff was not given time enough to bring in business; he was told that his efforts were satisfactory; and no new arrangement was made for 18 months.

Since it was plain that defendant terminated the contract in order to deprive the plaintiff of commissions, the only question for the jury was whether plaintiff was the procuring cause of the orders. This question was presented to the jury by proper instructions and the evidence supports the verdict."

The opinion below clearly indicates that the appellate court also recognized the decisive effect of a finding of bad faith and, in the absence of such finding, thereupon made its own finding to the effect that petitioner terminated the contract "for the purpose of depriving the broker of commissions to become due by reason of work already done."

In petitioner's Petition for Rehearing filed in the court below (R. 56) an analysis of the evidence is presented which shows that even if the court below possessed the power to make its own findings of fact in a jury case, a finding of bad faith in this case was not warranted. (R. 59-62) For the sake of brevity, that analysis is hereby incorporated as part of this brief.

Whether or not the weight of the evidence would have justified a finding of bad faith, the evidence was such that

the issue of bad faith was properly within the province of the jury.

Gunning v. *Cooley*, 281 U. S. 90, 74 L. ed. 720.

In that case the question related to the sufficiency of the evidence to warrant submission of the case to the jury as distinguished from a peremptory ruling by the trial court. The language there used is pertinent here to the extent that the issue of bad faith was raised by substantial evidence in favor of and against it. Had the trial judge found bad faith to exist as a matter of law then the scope of appellate review would have involved a review of all the evidence to determine the propriety of that ruling. In the instant case, however, the trial judge who, as the jury, heard and saw the witnesses, did not find bad faith. There was no finding by the trial judge and none by the jury. The general verdict of the jury cannot be said to have covered the question of bad faith since that question was never submitted to it. It would not have been proper for the trial judge in this case, in the light of the conflicting evidence, to have made a finding of bad faith as a matter of law, and, further, no such fiinding was made. Nor does the appellate court have the power to make such finding under such circumstances. In the *Gunning* case this Court said:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deductible from them. * * * Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions

> from them, the question is not one of law but of fact to be settled by the jury. Richmond & D. R. Co. v. Powers, 149 U. S. 43, 37 L. ed. 642, 643, 13 Sup. Ct. Rep. 748, 7 Am. Neg. Cas. 369."

In *Galloway* v. *United States*, 319 U. S. 372, 87 L. ed. 1458, this Court affirmed a judgment based on a directed verdict by the trial court because of the insufficiency of the evidence to take the case to the jury. In that case petitioner argued that the direction of the verdict deprived him of his right to trial by jury. After discussing the evidence in some detail, this Court reviewed the historical development of the directed verdict and the powers of trial courts to take cases from the jury without impairing the right to trial by jury. This Court then said:

> "The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence or on motion for a directed verdict, cannot amount to a departure from 'the rules of the common law' which the Amendment requires to be followed. If there is abuse in this respect, the obvious remedy is by correction on appellate review."

The instant case is distinguishable on its facts from that case in that the evidence of good faith was "substantial" on any basis of evaluation.

Further, in that case the trial judge who saw and observed the witnesses made an affirmative ruling that the petitioner's evidence was insufficient. In this case the burden of proof was upon respondent to prove bad faith,

the trial judge who saw and heard the witnesses made no finding or ruling thereon and the appellate court without having had an opportunity to observe the witnesses found that bad faith was established notwithstanding the substantial and direct evidence of good faith.

The last clause of the Seventh Amendment ("and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law"), applies to the appellate powers of United States courts in all common law cases coming up from inferior Federal courts or State courts.

Justices of Supreme Court v. *U. S. ex rel. Murray*, 9 Wall. 274, 19 L. ed. 658;

Chicago B. & Q. R. Co. v. *Chicago*, 166 U. S. 226, 242, 41 L. ed. 979;

Capital Traction Co. v. *Hof*, 174 U. S. 1, 43 L. ed. 873.

Appellate review in jury cases is, by virtue of the last clause of the Seventh Amendment, limited to the granting of a new trial or the award of a *venire facias de novo* for some error of law which intervened in the proceedings.

Parsons v. *Bedford*, 3 Pet. 433, 447, 7 L. ed. 732;

Justices of Supreme Court v. *U. S. ex rel. Murray*, *supra;*

Metropolitan R. Co. v. *Moore*, 121 U. S. 558, 30 L. ed. 1022;

Slocum v. *N. Y. Life Ins. Co.*, 228 U. S. 364, 57 L. ed. 879.

In the *Murray* case, *supra*, this Court said:

> "It is admitted that the clause applies to the appellate powers of the Supreme Court of the United States in all common law cases coming up from an inferior Federal Court, and also to the circuit court in like cases,

> in the exercise of its appellate powers. And why not, as it respects the exercise of these powers in cases of federal cognizance coming up from a state court? The terms of the amendment are general, and contain no qualification in respect to the restriction upon the appellate jurisdiction of the courts, except as to the class of cases, namely: suits at common law, where the trial has been by jury. The natural inference is that no other was intended. Its language, upon any reasonable, if not necessary, interpretation, we think applies to this entire class, no matter from what court the case comes, of which cognizance can be taken by the appellate court."

In a recent case this Court adhered to the same limitation upon appellate review.

> *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 87 L. ed. 626.

In the *Securities & Exchange Commission* case, *supra*, this Court said:

> "But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury."

The foregoing is believed to be sufficient to warrant the issuance of a writ of certiorari so that this Court may consider the problem of the scope of appellate review in jury cases, particularly the power of appellate courts to make original findings of fact in jury cases on decisive issues where neither the trial judge nor the jury made any finding.

Conclusion

It is respectfully submitted that the question presented herein requires review by this Court of the decision of the

United States Court of Appeals for the District of Columbia and, accordingly, a writ of certiorari should issue as prayed for in the petition.

Respectfully submitted,

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